

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

LOCAL 876, INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS (IBEW), AFL-CIO

Charged Party,

and

NLRB Case No. 07-CD-182456

NEWKIRK ELECTRIC ASSOCIATES, INC.

Charging Party

and

LOCAL 324, INTERNATIONAL UNION OF
OPERATING ENGINEERS, AFL-CIO

Intervenor

Donald H. Scharg (P29225)
dscharg@bodmanlaw.com
Bodman PLC
201 West Big Beaver Road, Suite 500
Troy, Michigan 48084
(248) 743-6024 (phone)
Attorney for Charging Party

Terry A. Morgan, Regional Director
Terry.Morgan@nlrb.gov
National Labor Relations Board, Region 7
477 Michigan Avenue, Room 300
Detroit, Michigan 48226

Michael J. Akins
mike@unionlaw.net
Gregory, Moore, Jeakle & Brooks, P.C.
65 Cadillac Square, Suite 3727
Detroit, Michigan 48226
Attorney for IUOE Local 324

Fillipe S. Iorio
florio@iorioleal.com
Kalniz, Iorio & Reardon Co., L.P.A.
4981 Cascade Road, S.E.
Grand Rapids, Michigan 49546
Attorney for IBEW Local 876

Kieth R. Bolek
kbolek@odonoghuelaw.com
O'Donoghue & O'Donoghue LLP
4748 Wisconsin Avenue, NW
Washington, D.C. 20016
Attorney for Amicus Curiae

**LOCAL 876, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS
(IBEW), AFL-CIO BRIEF IN OPPOSITION TO MOTION FOR RECONSIDERATION**

Law Offices of

KALNIZ, IORIO &
REARDON CO., L.P.A.

4981 Cascade Rd. S.E.
Grand Rapids, MI 49546



INTRODUCTION

On May 19, 2017 this Board issued its decision in *Local 876, Int'l Bhd. of Elec. Workers (IBEW), AFL-CIO & Newkirk Elec. Assocs., Inc. & Local 324, Int'l Union of Operating Engineers, AFL-CIO*, 365 NLRB No. 81 finding that there was no voluntary method to settle the underlying dispute and that the employees represented by IBEW Local 876 are entitled to continue to perform the disputed work for the Employer, Newkirk Electric Associates, Inc. ("Newkirk"). The Intervenor Union, Operating Engineers Local 324, has filed a Motion for Reconsideration asking the Board to reverse itself and find that IBEW Local 876 is bound or stipulated to the Building and Construction Trades Department's Plan for the Settlement of Jurisdictional Disputes in the Construction Industry ("Plan"). Both IBEW Local 876 and Newkirk oppose the Motion for Reconsideration.

Operating Engineers Local 324 raises no new arguments, cites no new evidence and identifies no extraordinary circumstances that warrant a reconsideration. Instead, Operating Engineers Local 324 seeks a second bite at the same apple before the same tribunal without providing any legal justification. The Board's May 19, 2017 Decision is firmly grounded in the record and its holding is consistent with decades long NLRB precedent recognizing that "outside" IBEW locals affiliated with the International Brotherhood of Electrical Workers, AFL-CIO ("IBEW") are not bound or stipulated to the Plan. For all the following reasons, this Board should deny the Motion for Reconsideration.

PROCEDURAL POSTURE

This is a jurisdictional proceeding under Section 10(k) of the National Labor Relations Act. An evidentiary hearing was held over the course of three days where all parties were represented by legal counsel. All parties filed post-hearing briefs. Upon leave of the Board, the Amicus Curiae Plan filed a brief arguing that the Board lacked jurisdiction because a "voluntary

method for adjusting” the dispute existed. The Board issued its Decision on May 19, 2017. The Board considered the record and briefs and held that there was no voluntary method for adjustment of the underlying dispute. The Board then considered the merits of the dispute and concluded that the employees represented by IBEW Local 876 are entitled to perform the work in dispute. The work in dispute has historically been performed by IBEW Local 876 represented employees and the Employer Newkirk prefers that IBEW Local 876 represented employees continue, as per practice, to perform the work. On June 16, 2017, the Operating Engineers Local 324 filed their Motion for Reconsideration challenging the Board’s decision to assert jurisdiction. The Operating Engineers Local 324 do not seek reconsideration of the Board’s decision on the merits.

There are no “extraordinary circumstances” that warrant reconsideration of this Board’s May 19, 2017 Decision. The Board specifically considered and rejected the arguments that the Operating Engineers Local 324 raises in its Motion. The Board considered fully both the Operating Engineers Local 324 and the Amicus Curiae Plan’s arguments that the Board lacks jurisdiction:

“Upon leave by the Board, amicus curiae Plan subsequently filed a brief arguing that the Board does not have jurisdiction to determine the dispute because all parties are stipulated to the Plan. The Employer and IBEW Local 876 subsequently filed briefs in response to the amicus brief.”

*Local 876, Int’l Bhd. of Elec. Workers (IBEW), AFL-CIO & Newkirk Elec. Assocs., Inc. & Local 324, Int’l Union of Operating Engineers, AFL-CIO, 365 NLRB No. 81 (May 19, 2017) *1.*

“Operating Engineers Local 324 moves to quash the notice of hearing, arguing that the parties have agreed upon a method for the voluntary adjustment of the dispute. It argues that both Operating Engineers Local 324 and IBEW Local 876 are stipulated to the Plan through the affiliation of their respective international unions with the Building and Construction Trades Department (BCTD), AFL-CIO. It argues in addition that the Employer is stipulated to the Plan through its

short form agreement with Operating Engineers Local 324, in which the Employer agreed to abide by the Plan. It also contends that IBEW President Stephenson's letter and IBEW Local 876's affirmative response to that letter "undermine" IBEW Local 876's claim that it is not stipulated to the Plan.

...

*4 Amicus Plan, like Operating Engineers Local 324, argues that all the relevant parties here--the Employer, IBEW Local 876, and Operating Engineers Local 324--are stipulated to the Plan pursuant to Plan procedures and the BCTD's Constitution and thus are bound to utilize the Plan, divesting the Board of jurisdiction to determine the dispute under Section 10(k)."

Id. at *3, 4.

The Operating Engineers Local 324 has not identified any material error in the Board's Decision that there is no agreed upon method for voluntary adjustment of the dispute to which all parties are bound. Indeed, the Board fully considered all evidence, properly applied controlling Board decisional law and issued a decision rightfully asserting jurisdiction over the unfair labor practice charge:

We further find, in agreement with the Employer and IBEW Local 876, that there is no agreed-upon method for voluntary adjustment of the dispute to which all parties are bound. It is well settled that "all parties to the dispute must be bound if an agreement is to constitute an agreed method of voluntary adjustment." *Laborers Local 1184 (High Light Electric)*, 355 NLRB 167, 169 (2010) (internal quotations omitted). The Board carefully scrutinizes the agreements at issue in order to determine if the parties are bound. Id.

The agreement between IBEW Local 876 and the Employer does not contain any provision binding Local 876 to the Plan. While IBEW Local 876 is affiliated with the IBEW, which is bound to the Plan, IBEW Local 876 Business Manager Chad Clark testified without contradiction that only "inside" IBEW locals are bound to the Plan, that IBEW Local 876 is an "outside" local, and that IBEW Local 876 is not affiliated with the BCTD. Consistent with this testimony, the Board has long "recognized the distinction between 'inside' and 'outside' locals of the IBEW and taken official note of the fact that the latter are not subject to the procedures for the resolution of jurisdictional disputes established by the [BCTD]," i.e., the Plan. *Electrical Workers, Local 44 (Utility Builders)*, 233 NLRB 1099, 1100 (1977); *Electrical Workers Local 357 (Western Diversified Electric)*, 344 NLRB

1239, 1240 (2005); *Local 542, Operating Engineers (W. V. Pangborne & Co.)*, 213 NLRB 124, 126-127 (1974) (citing cases).

Operating Engineers Local 324 argues that, regardless of any exemption from the Plan enjoyed by "outside" local unions in the past, the action of IBEW Local 876's parent body, via IBEW President Stephenson's letter, and IBEW Local 876's affirmative response to that letter undermine IBEW Local 876's current claim that it is not stipulated to the Plan. Operating Engineers Local 324 asserts that if IBEW Local 876, an "outside" local, were not stipulated to the Plan, IBEW President Stephenson would not have advised the Local to cease violating the Plan and IBEW Local 876 would have objected to Stephenson's "'directive'" rather than indicated that it had "complied." Contrary to Operating Engineers Local 324's argument, however, we find that President Stephenson's letter alone is insufficient, under the circumstances, to establish that IBEW Local 876 is bound to the Plan in light of the countervailing evidence set forth above.

Operating Engineers Local 324 also submitted into evidence a copy of the September 9 arbitrator's decision finding that the Employer, Operating Engineers Local 324, and IBEW Local 876 were all bound under the Plan.⁴ Amicus Plan argues that although IBEW did not participate in the arbitration hearing, neither IBEW nor IBEW Local 876 is relieved of its obligations under the Plan. However, the arbitrator's decision cannot bind IBEW Local 876 to the Plan inasmuch as IBEW Local 876 was not party to the arbitral proceeding and did not agree to be bound by its results. *High Light Electric*, 355 NLRB at 169.

*6 In these circumstances, we find that Operating Engineers Local 324 has not established that IBEW Local 876 is bound under the Plan

Id at *5, 6 (omitting footnotes).

STANDARD OF REVIEW

Under Section 102.48(c)(1) of the Board's Rules and Regulations, a motion for reconsideration must be justified by "*extraordinary circumstances*":

"A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order.

(1) A motion for reconsideration must state with particularity the material error claimed and with respect to any finding of material fact, must specify the page of the record relied on." See NLRB Rule 102.48(c)(1).

Law Offices of

KALNIZ, IORIO &
REARDON CO., L.P.A.

4001 Cascade Rd. S.E.
Grand Rapids, MI 49546

There being neither “extraordinary circumstances” nor “material error,” the Board should deny the Operating Engineers Local 324’s Motion. See e.g., *Phoenix Coca-Cola Bottling Company*, 338 NLRB 498 (2002); *United Association of Journeyman and Apprentices of the Plumbing and Pipefitting Industry*, 2011 WL 6096291 (December 7, 2011).

ARGUMENT

A. The Board properly considered and rejected the Operating Engineers Local 324’s argument that Local 876 is bound to the Plan.

The Operating Engineers Local 324 cannot establish that the Board committed “material error” by “failing to consider significant evidence.” Motion at 6-8. The six cited pieces of record evidence that the Operating Engineers Local 324 cites as being “ignored” were clearly considered by the Board. The Board considered the fact that Local 876 is “affiliated with the IBEW.” See e.g., Decision at * 3. The Board cited to the IBEW’s Constitution. See e.g., Decision at * 2 fn 2. The Board noted that the IBEW is a member of the BCTD and cites to the Plan and the Operating Engineers Local 324’s reliance upon the BCTD’s Constitution. Decision at * 2, 3. The Board specifically addresses the Operating Engineers Local 324 and the Plan’s citation to the BCTD Constitution and the copy of the “arbitrator’s decision.” Decision at * 2, 3, 4. The Operating Engineers Local 324 cannot cite to a single piece of evidence that was “ignored” by the Board. The fact that the Board rejected the Operating Engineers Local 324’s argument is not a basis to reconsider the May 19, 2017 Decision. Not only were these pieces of record evidence considered, the Operating Engineers Local 324’s argument that Local 876 was “bound to the Plan” was rightly rejected as Local 876 is an “outside” local that is not bound to the Plan.

A motion for reconsideration is not an opportunity for the movant to rehash rejected arguments. Notwithstanding this point, there is no dispute in the record that IBEW Local 876 is

an "outside" local that is not bound to the Plan. The Operating Engineers Local 324 mischaracterizes the record in asserting that "the only evidence to the contrary in this record is the self-serving testimony of the Local 876 Business Manager, who testified that the Local Union is not bound to the Plan." Motion at 8. Even if this were true, this undisputed testimony alone would be sufficient to sustain the Board's decision. However, the record is replete with evidence supporting the Board's decision.¹ IBEW Local 876 is not a signatory to the Plan. Intervenor Exhibit 10; Tr. 451 (IBEW Local 876 business manager has never before even seen the "Plan"). The collective bargaining agreement between Newkirk Electric and IBEW Local 876 makes no mention of the "Plan" because IBEW Local 876 is not bound by the Plan. Employer Exhibit 4. IBEW Local 876 is not a member of the BCTD. Tr. 451- 452. IBEW Local 876 business manager Clark testified, without contradiction, that IBEW Local 876 is an outside local and that outside locals are not subject to the "Plan." Tr. 450-453.

The IBEW agrees that its outside locals are not subject to the Plan. The IBEW Constitution defines IBEW Local 876 as an outside local; IBEW Local 876 was chartered as an outside local in 1938. Charged Party Exhibit 6 at 85; Tr. 425-426. The IBEW's "Business Managers Construction Jurisdiction Handbook" reaffirms that outside IBEW locals are not subject to the Plan by explicitly stating that:

"The outside branch of the IBEW does not participate in the plan for the settlement of jurisdictional disputes in the construction industry, and work recognized by I.O. as coming under the outside branch will not be subject to the plan for the settlement of jurisdictional disputes in the construction industry procedures." Charged Party Exhibit 15 (emphasis added).

¹ Moreover, the Operating Engineers Local 324 fail to recognize that it bears the burden of proving the existence of a voluntary method of dispute: "Section 10(k) further mandates that the party alleging the existence of this resolution produce satisfactory evidence of it ("the Board is empowered and directed to hear the dispute ... unless ... the parties to such dispute submit to the Board satisfactory evidence that they have adjusted ... the dispute.")" *N.L.R.B. v. Millwrights Local 1102, United Bhd. of Carpenters & Joiners of Am., AFL-CIO*, 779 F.2d 349, 351 (6th Cir. 1985). It failed to produce an iota of evidence in this regard.

Pursuant to their constitution, outside IBEW locals are not subject to the Plan. Charged Party Exhibit 6. at 83-85. This finding is supported by controlling NLRB case law stretching back decades.

The record not only was not “ignored,” but the Board rightly considered the evidence and reached the conclusion that there is no voluntary method for adjustment of the dispute.

The Operating Engineers Local 324 raises the same arguments, and cites to the same case law, that were asserted in the post-hearing briefs filed by the Amicus Curiae Plan and Local 324. Seven of the eight Board decisions string cited in the Operating Engineers Local 324’s Motion for Reconsideration on page 8 were specifically relied upon in the Amicus Curiae Plan’s brief. See Amicus Curiae Plan brief “table of authorities at p. ii.” These cases, regurgitated for a second time by the Operating Engineers Local 324, actually counsel in favor of finding that IBEW Local 876 is not bound by the Plan. None of the cases re-cited by the Operating Engineers Local 324 involve an outside IBEW local. The many Board decisions which have consistently held that IBEW outside locals are not bound to the Plan (or its predecessors) are evidence that an agreed-upon method for voluntary adjustment was never adopted. It bears repeating that the Board’s longstanding established holding that outside locals are not bound by the Plan is controlling. It is well settled NLRB law that IBEW Local 876, an outside local, is not subject to the Plan:

- “The International Brotherhood of Electrical Workers did participate in the December 6 arbitral hearing, but Local 196 did not. Even if the arbitrator’s decision establishes that the International is bound under the Plan, it does not necessarily follow that Local 196 was so bound. Local 196 ***Business Agent Eric Patrick testified, without contradiction, that only “inside” IBEW locals are bound under the Plan, that Local 196 is an “outside” local, and that Local 196 is not affiliated with the Building and Construction Trades Department.*** The record is devoid of documentary evidence tending to show otherwise. *Int’l Bhd. Of Elec. Workers, Local 196 & Aldridge Elec., Inc. & Int’l Union of Operating Engineers, Local 150*, 358 NLRB 737, 741 (2012);

- “We further find that there is no agreed-upon method for voluntary adjustment of the dispute in this case. Notwithstanding Operating Engineers’ contention that the Plan binds both unions, there is no evidence in the record that the Plan applies to IBEW’s claim of the work. IBEW claims the work under its outside agreement with the Employer, and that agreement, which is part of the record, makes no reference to the Plan. *In addition, IBEW’s business manager testified, without contradiction, that the Plan was not applicable to that agreement, but applied only to the inside agreement between IBEW and the Employer, which does not cover the work in dispute. In these circumstances, we find that Operating Engineers’ motion to quash should be denied.*” *Int’l Bhd. Of Elec. Workers Local 357 AFL-CIO & W. Diversified Elec. & Int’l Union of Operating Engineers, Local 12*, 344 NLRB 1239, 1240 (2005)(Western Diversified Electric);
- “outside locals of the IBEW are not members of the AFL-CIO Building Trades Council and do not consider themselves bound by the Disputes Board decisions.” *Local 2, The Welsbach Corporation*, 218 NLRB 92 (1975);
- “The Electrical Workers local here involved must be deemed, under the terms of article 28, section 4, of the International Brotherhood of Electrical Workers Constitution, to be an “outside” local; and we have in the past recognized that such IBEW “outside” locals are not members of the AFL-CIO Building Trades Council and are not, therefore, bound by the IJDB’s decisions. We therefore find that an agreed-upon method binding on all parties does not exist for the voluntary adjustment of this dispute.” *Local 542, Operating Engineers*, 213 NLRB 124, 126–27 (1974);
- “Furthermore, we note that the Board has, in several decisions over the years, recognized the distinction between “inside” and “outside” locals of the IBEW and taken official note of the fact that the latter are not subject to the procedures for the resolution of jurisdictional disputes established by the Building and Construction Trades Department, AFL-CIO.” *Elec. Workers, Local 44, (Utility Builders)* 233 NLRB 1099, 1100 (1977);

The Board properly cited this decisional history. Decision at * 3.

The Board did not commit “material error” “with respect to its conclusion that Arbitrator Pierson’s award ‘cannot bind IBEW Local 876 to the Plan inasmuch as IBEW Local 876 was not party to the arbitral proceeding and did not agree to be bound by its results’” as alleged in the Motion. Motion at 11. The Operating Engineers Local 324 devote a single paragraph to this bankrupt theory. In any event, the claim that the “evidence establishes that Local 876 was represented by the IBEW in the arbitration proceeding” is incorrect as matter of record and

irrelevant as a matter of law. There is no excuse for the Plan's failure to provide notice to IBEW Local 876 about its decision to initiate and conduct an arbitration hearing. The claim that "notice of the proceeding was provided to Local 876's parent union" does not alleviate the basic due process concerns raised by Local 876 and cited by the Board. There is no dispute that no notice was provided to IBEW Local 876. Tr. 456-457, 466; Intervenor Exhibits 16, 19. An alleged notice to the IBEW does not satisfy a requirement to provide notice to IBEW Local 876.

This Board has rejected alleged voluntary dispute resolution proceedings where the arbitrator/plan fails to comply with basic notions of due process like providing notice. "We also conclude that the Joint Board award was not an effective voluntary adjustment of the dispute, within the meaning of Section 10(k), since all the parties did not participate in the proceeding, did not join in the submission to the Joint Board, and did not agree to be bound by the decision." *Elec. Workers, IBEW, Local 497 (Kemper Constr. Co.)*, 191 NLRB 145, 147 (1971); *Int'l Bhd. of Elec. Workers, Local 196 (Aldridge Electric)*, 358 NLRB 737, 740 (2012) ("arbitrator's decision cannot bind [the local union] to the Plan inasmuch as [the local union] was not party to the arbitral proceeding and did not agree to be bound by its results"); *High Light Electric*, 355 NLRB 167, 169 ("Local 440 submitted into evidence a copy of the arbitrator's decision holding that the Employer is bound to the Settlement Plan. But the arbitrator's decision itself cannot bind the Employer to the Settlement Plan, inasmuch as the Employer was not a party to the September 29 proceeding and did not agree to be bound by its results").

B. The Board properly found it unnecessary to decide whether the Employer was bound under the Plan.

The Operating Engineers Local 324's claim, without any citation to legal authority, that "Section 10(k) requires the Board to make a finding as to whether Newkirk is also bound to the Plan" must be rejected. Motion at 12. The Operating Engineers Local 324 offers no legal

Law Offices of

HALNIZ, IORIO &
REARDON CO., L.P.A.

4001 Cascade Rd. S.E.
Grand Rapids, MI 49546

authority in support of this contention and thus it has abandoned this baseless argument. "Issues raised in a perfunctory manner, without supporting arguments and citation to authorities, are generally deemed to be waived." *N.L.R.B. v. McClain of Georgia, Inc.*, 138 F.3d 1418, 1422 (11th Cir. 1998). In any event, this Board's decision finding it "unnecessary to decide whether the Employer was bound under the Plan because all parties to the dispute must be bound if an agreement is to constitute an agreed-upon method of voluntary adjustment" is not material error.

CONCLUSION

For all the foregoing reasons, IBEW Local 876 respectfully requests that the Motion for Reconsideration be denied.

Respectfully submitted,
KALNIZ, IORIO & REARDON CO., L.P.A.

DATE: July 12, 2017

By: 

Fillipe S. Iorio (P58741)
Attorney for IBEW Local 876
4981 Cascade Road, S.E.
Grand Rapids, Michigan 49546
Telephone: (616) 940-1911
Facsimile: (616) 940-1942
Email: groffice@kiflaw.com

Law Offices of

KALNIZ, IORIO &
REARDON CO., L.P.A.

4981 Cascade Rd. S.E.
Grand Rapids, MI 49546

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

LOCAL 876, INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS (IBEW), AFL-CIO

Charged Party,

and

NLRB Case No. 07-CD-182456

NEWKIRK ELECTRIC ASSOCIATES, INC.

Charging Party

and

LOCAL 324, INTERNATIONAL UNION OF
OPERATING ENGINEERS, AFL-CIO

Intervenor

Certificate of Service

The undersigned certifies that he has served a copy of the Local 876, International Brotherhood of Electrical Workers (IBEW), AFL-CIO Brief in Opposition to Motion for Reconsideration upon counsels for Charging Party and Involved Party via email on July 12, 2017, as follows:

Terry Morgan
Regional Director for NLRB Region 7
Terry.Morgan@nrlb.gov

Mary Beth Foy
Hearing Officer
Marybeth.foy@nrlb.gov

Donald Scharg
Attorney for Newkirk Electric Associates, Inc.
dscharg@bodmanlaw.com

Michael J. Akins
Attorney for Local 324, International Union of Operating Engineers, AFL-CIO
mike@unionlaw.net

Law Offices of

KALNIZ, IORIO &
HEARDON CO., L.P.A.

4571 Cascade Rd. S.E.
Grand Rapids, MI 49548



Keith R. Bolek
Attorney for Plan of the Settlement of Jurisdictional Dispute
kbolek@odonoghuelaw.com



Fillipe S. Iorio

Law Offices of

KALNIZ, IORIO &
REARDON CO., L.P.A.

4981 Cascade Rd. S.E.
Grand Rapids, MI 49546

